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Charles E. Pitts v. Leo Roberts : Brief of Respondent

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

F THE STATE OF UTAH

CHARLES E. PITTS and ETHEL J. PITTS, Plaintiffs-Appellants, v. LEO ROBERTS, Defendant-Respondent.	)	Case No. 14454

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY,
STATE OF UTAH

HONORABLE STEWART M. HANSON, SR., JUDGE

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STATEMENT OF THE KIND OF CASE

This is an action brought by plaintiff against defendant, seeking a determination that a strip of land owned by defendant is a public thoroughfare and a declaration that defendant's land is subject to a prescriptive easement for plaintiffs' use.

DISPOSITION IN LOWER COURT

The case was tried before the Trial Court without a jury on June 10, 1975. Thereafter, the Trial Court made and entered its Findings of Fact and Conclusions of Law (R. 36-39), and Judgment (R. 34-35), in favor of defendant and against plaintiffs on both issues raised in plaintiffs' Complaint. Plaintiffs appeal from the Trial Court's Judgment.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks to affirm the Findings of Fact and Conclusions of Law and the Judgment made and entered by the Trial Court.

STATEMENT OF FACTS

The Statement of Facts contained in the brief of Plaintiffs-Appellants improperly sets forth the facts in a light most favorable to Plaintiffs-Appellants, the losing parties in the Trial Court. The Utah Supreme Court repeatedly has held that the facts on appeal must be reviewed in the light most favorable to the prevailing party in the court below. Furthermore, the Statement of Facts contained in the brief of plaintiffs contains so many inaccuracies and inconsistencies with the evidence produced at trial that it is essential that defendant set forth the following Statement of Facts as found by the Trial Court and supported by the evidence.

This action does not involve the right to use an alleyway which runs east and west between Emery Street and Concord Street as asserted in plaintiffs' Statement of Facts. It involves only the right claimed by plaintiff's to use a strip of land along the south portion of defendant's residence property at 420 Emery Street, Salt Lake City, Utah. The strip of land in question is approximately five to six feet wide and 123.2 feet long (Tr. 110 and Exhibit 2-P). The action does involve the right of any parties to use the alleyway which extends west from the west boundary of defendant's property

to Concord Street or the alley which extends north along the west boundary of plaintiff's property to 4th South Street (See Exhibit 2-P). It is essential that there be no confusion concerning this point.

The general area in question is depicted in the area of Exhibit 2-P which is surrounded by a red line. The plat indicates a 16-foot wide alleyway extending from Concord Street east to the west boundary of defendant's property. The alleyway then continues north at approximately the same width along the west boundary of defendant's property to 4th South Street (Exhibit 2-P). The alleyway shown on the plat does not extend across defendant's property (Exhibit 2-P). The strip of land is question is an area about five to six feet wide along the south portion of defendant's property (Tr. 110 and Exhibit 2-P). The strip of land in question is referred to as a "walkway" (Exhibits 6-D and 12-D).

The only testimony concerning the use of the walkway from 1920 until approximately 1954 was the testimony of a witness called by plaintiff, Mrs. Timothy, who has lived in a lot adjoining the alleyway to the west of defendant's property since 1952 (Tr. 80). From 1920 until 1952 she lived in the surrounding area (Tr. 80). She testified that in 1920 the alley was gravel and not paved. Concerning the use of the alley in 1920, she testified:

> I think most everybody they used it because the other was just vacant property and there hadn't been anything which they had, no reason to go over that (Tr. 81).

There was no testimony that anyone other than the adjoining landowners used the alleyway at that time or that any persons used the portion of defendant's property in question. There was no testimony as to the duration or frequency of the use.

No one ever testified that a family named Potter operated a public garage between 1920 and 1936 for repairing and painting of cars, as asserted in plaintiff's brief. The plaintiffs' witness, Mrs. Timothy, testified that sometime prior to 1952 a Mr. Potter had "a big garage there, a big shop." Mr. Potter repaired and painted cars at the garage, but there was no testimony that he did it for the public or that any members of the public drove through the alley to the garage (Tr. 87).

A second witness called by plaintiff, Rolland David Lay, had lived in the area since September, 1936. In 1936 there were only a few homes along the alley and the owners of those homes used the alley occasionally for delivery of coal and hay (Tr. 95). There was no testimony that any of those parties used the entire length of the alleyway or that they used the property in question to the south of defendant's property. There was no testimony as to how long they used the alley. Mr. Lay testified that he has used the alley but he never stated when he used it or whether he used the walkway in question. He testified that a number of years ago someone blocked the alleyway with a pole for a day or two and the blockade then disappeared (Tr. 96).

In 1946, plaintiffs purchased the house where they presently reside on Concord Street at the west end of the alleyway (Tr. 62 and Exhibit 2-P). In 1946 the alleyway was graveled (Tr. 63). Plaintiff Charles Edward Pitts testified only that he has driven into one end of the alley, backed into his yard and driven out the other end of the alley "for a long time" (Tr. 66). When he drove in the alleyway, he would drive an old 1951 Dodge pickup truck which sometimes was operable (Tr. 66). He did not state when or for how long he drove through the alleyway and he did not testify when or for how long he drove over the strip of defendant's property in question.

There was a conflict in the evidence as to when the alleyway was first paved. Rolland David Lay testified that it was paved 12 or 13 years ago (Tr. 96). Mr. Lay testified that the Salt Lake City Street Department installed the blacktop (Tr. 96-97). Other witnesses testified that the alley was blacktopped between 1952 and 1954 (Tr. 68 and 85). There was testimony that children who used to walk through the vacant property now walk through the alley (Tr. 85), but there was no testimony as to whether they have walked over the strip of land in question, or for how long or how frequently the children walked through the alley.

Until December of 1952 there was a dedicated alleyway running north and south between 4th South Street and the

alleyway in question to the west of defendant's property (Exhibit 2-P). An action was brought by the land owners in the area in 1952 and the alleyway was vacated by the city of Salt Lake (Tr. 86 and Exhibit 7-D and 9-D). Up until that time the alleyway running north and south was a dedicated public road and apparently a continuation of the alleyway running west from the west boundary of defendant's property to Concord Street (Exhibit 2-P).

Plaintiff Charles E. Pitts did not use the alleyway daily, as asserted in plaintiff's brief, and there is no testimony that when he used the alleyway he used the strip of property belonging to defendant more than a few times (Tr. 63 and 66). As to the times that he did use defendant's property, he testified that he merely drove over that property "for a long time" (Tr. 66). According to his own testimony he only used the alleyway when he was driving his old 1951 Dodge pickup truck and then only when the truck was operable (Tr. 66). In short, there was no testimony as to the length of the time he drove over the strip of land in question or the frequency of his use of the property.

Plaintiff Charles E. Pitts testified that there were two apartments near the alley and the tenants may have used the alley aabout every day, but he does not know (Tr. 65). He testified that other people who live along the alley used the alley to load garbage from their yards, but he never testified as to the frequency of their use or whether any of them used the

portion of defendant's property in question (Tr. 65). Rolland Lay testified that he sees cars using the alley every day but he does not know whose cars they are and he does not know if the cars go out Emery Street from the alley by way of the strip of property belonging to defendant (Tr. 98). He again did not testify as to the length of time he has seen the cars using the alley.

The defendant moved into his present residence in June of 1971 (Tr. 109). He previously lived in the same area from 1961 to 1971. During that time he never observed any traffic in the walkway. At the time he moved into the house in 1971, the walkway was five or six feet wide (Tr. 110), and the alleyway extended west from his property to Concord Street and was eight feet wide (Tr. 115). From the time he moved into the house, he has continually blocked the alleyway with trash cans and with his car up to the south side of his property line (Tr. 114 and 115). He has not allowed people to use the walkway since the time he moved into the house if he can help it (Tr. 110). The walkway in question along the south side of defendant's property is not wide enough for a car to drive over it and stay on the pavement (Tr. 115).

With the property belonging to the defendant blocked, the owners of the other property in the area, including the plaintiffs, have the full use of the alleyway extending from Concord Street east to the west boundary of defendant's property and they are not inhibited from using that dedicated alleyway (Tr. 118).

ARGUMENT

POINT I

UNDER THE CARDINAL RULES OF APPELLATE REVIEW, THE FINDINGS, CONCLUSIONS AND JUDGMENT OF THE TRIAL COURT MUST BE AFFIRMED.

By this appeal, the plaintiffs are attacking the Findings of Fact and Conclusions of Law of the Trial Court which held that the plaintiffs have failed to establish that the strip of land in question is a public highway or public thoroughfare by reason of public use for more than 10 years and that the plaintiffs have failed to establish that they have a prescriptive right to the use of the strip of land in question.

The rules of appellate procedure in instances in which the appellant attacks the findings of the Trial Court are clearly set forth in Charlton v. Hackett 11 Ut. 2d 389, 360 P.2d 176 (1961), in which the Court specified the following "cardinal rules of review" concerning the Findings and Judgment of the Trial Court:

(1) To indulge them a presumption of validity and correctness;

(2) To require the appellant to sustain the burden of showing error;

(3) To review the record in the light most favorable to them;

(4) Not to disturb them if they find substantial support in the evidence.

Thus, all presumptions favor the findings and judgment of the Trial Court and the party attacking those findings and judgment has the burden of showing that they are in error and should be overturned. As to the review of the record, plaintiffs-appellants recite the evidence most favorable to their contentions to the exclusion of other evidence favorable to defendants, in addition to clearly misstating the facts produced in evidence, which is not permissable on appellate review. Thomson v. Condas 27 Ut. 2d 129, 493 P.2d 639 (1972).

Of equal and vital importance is the rule of appellate review governing the refusal of the Trial Court to make findings essential to the appellant's right to recover. The rule is well-stated in First Western Fidelity v. Gibbons and Reed Co. 27 Ut. 2d 1, 492 P.2d 132, (1971), which held as follows:

> Where the appellant's position is that the trial court erred in refusing to make certain findings essential to its right to recover, and insists that the evidence compels such findings, it is obligated to show that there is credible and uncontradicted evidence which proves those contended facts with such certainty that all reasonable minds must so find. Conversely, if there is any reasonable basis, either in the evidence or from the lack of evidence upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence, then the findings should not be overturned. [Emphasis added].

Thus, the evidence presented at trial as summarized in the foregoing statement of facts makes it clear that the

findings of the Trial Court are supported by the evidence in the record. Plaintiffs have failed to meet their burden of proving that there is credible and uncontradicted evidence which proves their allegations with such certainty that all reasonable minds must so find and further that there is no reasonable basis, either in the evidence or from the lack of evidence, upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence. Therefore, the findings of the Trial Court should not be disturbed and the judgment must be affirmed.

POINT II

THE TRIAL COURT DID NOT ERR IN HOLDING THAT PLAINTIFFS FAILED TO ESTABLISH THAT THEY ACQUIRED A PRESCRIPTIVE EASEMENT FOR THE USE OF DEFENDANT'S PROPERTY.

Defendant has no quarrel with plaintiff's statement of law regarding prescriptive easement as set forth in 4 Tiffany Real Property (3rd Edition), § 1191, P. 960, in which it is stated that,

> To acquire easement over land by prescription, it is necessary to show use:
>
> 1. Adverse to the owner.
> 2. Under a claim of right.
> 3. Open.
> 4. Notorious.
> 5. Continuous.
> 6. Uninterrupted.
> 7. For the period of prescription.

Defendant also has no argument with plaintiff's contention that the period of prescription in Utah is 20 years. See

Anderson v. Osguthorpe 29 Ut. 2d 32, 504 P.2d 1000 (1972).

The serious error in plaintiff's arguments is that plaintiffs totally misstate the facts produced in evidence, state the facts in the light most favorable to plaintiffs, and ignore the rules of appellate review set forth above.

Neither of the plaintiffs ever testified that they used the alleyway openly and continuously since 1946, as asserted in plaintiff's brief. The substance of the testimony of plaintiff Charles E. Pitts is set forth in the foregoing statement of facts. Plaintiff Charles E. Pitts stated that he used the alleyway on occasion for "a long time" (Tr. 66). At the times when he used the alley, he only used it when his old 1951 Dodge pickup truck was operable and he never stated for how long the truck was operable or at what time the truck was operable (Tr. 66). When the truck was operable, there is no indication from his testimony that he drove the truck over defendant's property other than once or twice. In short, there is no evidence even in the statements by plaintiff Charles E. Pitts that he used defendant's property "openly and continuously since 1946." Additionally, the alleyway was blocked sometime before defendant obtained the property in 1971 (Tr. 96), and defendant continually blocked the entrance to the strip of property owned by defendant after he purchased the property in 1971 (Tr. 110, 114, and 115).

Plaintiffs then argue in Point I of their brief that the claim of right by plaintiff Charles E. Pitts to use defendant's property was that it was "apparently and obviously"

a gravel passageway open to use by the general public. This argument is totally inconsistent with the plaintiff's argument that plaintiff Charles E. Pitts obtained a prescriptive easement for use of the property. If plaintiff were able to establish that plaintiff used the alleyway in common with the general public, this would not constitute use adverse to the owner of the property for purposes of obtaining a prescriptive easement.

In the case of Chournos v. Alkema, 27 Ut. 2d 244, 494 P.2d 950 (1972), the court held that a use by the plaintiff in common with members of the general public is not sufficient to establish a prescriptive easement for use of the property. The Court reasoned as follows:

> The trial court erred insofar as it found a prescriptive right in defendants based upon public use. A prescriptive right was originally based upon the theory of a grant implied from long user, and it runs to the individual and not to the public. One cannot claim a right of way as a private one by showing it has been used by the public. He must show user by himself or his predessors of the way to his own lot.
>
> > While a public road may be so established, the use by individual persons in common with the public generally is regarded as permissive, and by such common use no individual person can acquire a right by prescription as against the owner of the fee ... [cites Thornley Land and Livestock Company v. Morgan Brothers Land and Livestock Company, 81 Ut. 317, 17 P.2d 826-27 (1932)]. [Emphasis supplied by the Court].

Thus, even if plaintiff Charles E. Pitts could establish that he used the property owned by defendant for the period of prescription in the same manner as the "general public," he would clearly not have established a prescriptive easement for use of the property.

Plaintiffs then argue that "uncontroverted testimony of two witnesses establishes the paving of the alleyway between 1950 and 1954. To the contrary, one of the plaintiffs' own witnesses testified that the alley was paved 12 or 13 years ago (Tr. 96). Even if the alleyway were paved in 1954 and the alleyway were used by plaintiff Charles E. Pitts continually thereafter, there would not be 20 years of uninterrupted use by plaintiff, since defendant continually blocked the alleyway beginning in 1971. There is no testimony as to why the city paved the portion of defendant's property when it did, but certainly no implication can be drawn from the mere fact that someone from the city may have installed paving material on a portion of defendant's property, particularly when defendant prevented people from entering the property.

There is no evidence in the record that plaintiff used the property in question adversely to the owner, under a claim of right, openly, notoriously, continuously, without interruption, for the period of prescription. Therefore, neither of plaintiffs has met the requirements of proving a prescriptive easement, for 20 years or any other period.

Thus, plaintiffs have failed to show that there is credible and uncontradicted evidence which proves the facts contended by plaintiff with such certainty that all reasonable minds must so find and that there is no reasonable basis, either in the evidence or from the lack of evidence, upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence. On this basis, the finding of the Trial Court that the plaintiffs failed to establish a prescriptive easement in the property in question is clearly supported by the evidence and the Trial Court's judgment based upon the findings must be upheld.

POINT III

THE TRIAL COURT DID NOT ERR IN HOLDING THAT PLAINTIFFS FAILED TO ESTABLISH THAT THE PORTION OF DEFENDANT'S PROPERTY IN QUESTION BECAME A PUBLIC THOROUGHFARE BY PUBLIC USE FOR MORE THAN 10 YEARS.

As noted in the argument under Point II, above, plaintiffs are making the totally inconsistent claims that, on the one hand, plaintiffs have established a prescriptive easement for use of the property in question and, on the other hand, that defendant's property has impliedly been dedicated to the public by defendant and defendant's predessors under section 27-12-89, Utah Code Annotated, 1953. The inconsistency between these claims is pointed out in Chournos v. Alkema, Supra.

Section 27-12-89, Utah Code Annotated, 1953, provides as follows:

> A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of 10 years.

Under this statute, an owner of property may impliedly dedicate his property to public use as a public thoroughfare if he allows the public to use the property for the prescribed period under circumstances which would indicate that he intended to dedicate his property to the use of the public in general. The rule is well stated in Morris v. Blunt, 49 Ut. 243, 161 P.2d 1127, 1130, as follows:

> A dedication rests primarily on the intent of the owner. There must be a concession intentionally made by him, which may be proved by declarations or by acts, or may be inferred from the circumstances. No form or ceremony is necessary. It must, however, appear that he knew of the use by the public, and intended to grant the right of way to the public. [Emphasis added]

Inasmuch as a finding by the court that the owner of property has impliedly dedicated his property to the public would constitute an appropriation of the individual's property by the state, such a dedication is not taken lightly and all presumptions are in favor of the property owner. The rule is stated in Bonner v. Sudbury, 18 Ut. 2d 140, 417 P.2d 646, 648, as follows:

> In connection with this review we deem it appropriate to note our agreement that the dedication of one's property to a public use should not be regarded lightly and that

> certain principals should be adhered to. The presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it. The mere fact that members of the public may use a private driveway or alley without interference will not necessarily establish it as a public way; nor will the fact that it was shown on the public records to be a public street, nor even that it had been paved and sign posted as a public street by the city. [Emphasis added]

Thus, all presumptions are in favor of the property owner and a great burden of proof is placed upon the person claiming that the land has been dedicated to a public use. To hold otherwise would be to allow a taking of private property for public use without just compensation to the owner. See Justice Callister's dissent in Bonner v. Sudbury, Supra.

Also, the rule is clear in Utah that evidence of use of a roadway by the owners of property adjacent to the road does not constitute a use by the public for purposes of implied dedication of the roadway. Petersen v. Combe, 20 Ut. 2d 376, 438 P.2d 545 (1968).

There was no evidence produced at trial that the portion of defendant's property in question was used continuously as a public thoroughfare by the general public for a period of 10 years. No one testified that the defendant's property or any portion of the alleyway was used for "general vehicular traffic," as was argued in plaintiff's brief. Plaintiff Charles E. Pitts only observed use of the alleyway by

tenants in an apartment house adjacent to the alley, owners of homes adjacent to the alley, and children who played in the alley (Tr. 65, 70, and 75). Plaintiff's witness, Mrs. Timothy, testified only as to use of the alley by persons who owned property adjacent to the alley, tenants in the apartment house adjacent to the alley, and children who played and walked in the alley (Tr. 81-87). She did not testify as to whether defendant's property was used by those parties.

Plaintiff's other witness, Rolland David Lay, has seen cars using the alley every day, but he does not know who owned those vehicles (Tr. 98), and he apparently does not know whether they are members of the general public. He did not testify as to the duration of the use. Furthermore, he does not know if those cars drive out Emery Street at the other end of the alley (Tr. 98), and he thus does not know whether any of those cars have ever driven onto defendant's property. According to his understanding, those cars may well have driven to the apartment house adjacent to the alley and then have driven out the same way they came in without crossing defendant's property (Tr. 98).

None of the testimony by the witnesses produced by plaintiffs specified the dates of use or the frequency of use by any of the persons who use the alley in question, other than the use by some adjacent property owners. There is no testimony that the alley was ever used by the public for entrance to a garage and repair shop, as asserted by plaintiffs. In short, there was no testimony produced at trial as to use of

defendant's property by the general public or as to the frequency of use or the periods of time the alley was used.

In contending that the trial court erred in refusing to find that the plaintiffs established a public use of the road for a period of 10 years, the plaintiffs must first prove that the defendant intentionally dedicated the strip of land in question to the use of the public when all presumptions favor the retention of the property by the land owner. Bonner v. Sudbury, Supra. Since the Trial Court found the issues in favor of the defendant and against the plaintiffs, all facts must be viewed in a light most favorable to the defendant, and the plaintiffs have the burden of showing error. The court will indulge the Trial Court's findings with a presumption of validity and correctness. In order to disturb the findings of the Trial Court, the plaintiffs must show that there is credible and uncontradicted evidence which proves the plaintiffs' contentions with such certainty that all reasonable minds must so find and that there is no reasonable basis, either in the evidence or from the lack of evidence upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence. First Western Fidelity v. Gibbons and Reed Co., Supra. In view of the facts and authorities set forth above, the plaintiffs have clearly failed to meet their burden on appeal and the findings and judgment of the trial court must be affirmed.

POINT IV

THE FINDINGS OF THE TRIAL COURT CLEARLY SUPPORT THE COURT'S JUDGMENT.

In paragraph 6 of the Trial Court's findings of fact, the Trial Court found that the evidence presented by the plaintiff was absolutely lacking as to any evidence of necessity for use of defendant's property by plaintiffs. This finding was entered by the Trial Court, inasmuch as it was not entirely clear whether plaintiffs were claiming easement by implication in addition to plaintiff's claims of easement by prescription and dedication by public use (See plaintiff's Complaint at R1-2). Even if the Trial Court had considered necessity to be an element of prescriptive easement or dedication by public use, however, this would not be relevant to plaintiff's appeal, in that the remaining findings by the Trial Court clearly support the Trial Court's conclusions of law and judgment (R. 34-39).

The rule is well established in Utah that a Trial Court's judgment should be affirmed if the court reached the correct results even if he did not give the correct reason for his ruling. Foss Lewis and Sons Construction Co. v. General Insurance Co. of America, 30 Ut. 2d 290, 517 P.2d 539 (1973). In the present case, the Trial Court merely added one finding in addition to the findings which clearly supported the Trial Court's conclusion and judgment. The additional finding in no way detracts from the other findings of fact. Therefore, whether the plaintiffs did or did not claim an easement by implication is irrelevant, in that the Trial Court's

judgment is clearly supported by the findings of the Trial Court.

CONCLUSION

The Trial Court made and entered Findings of Fact favorable to defendant. The strong presumption of the correctness and validity of the findings has not been overcome by plaintiffs, nor have plaintiffs demonstrated that there is credible and uncontradicted evidence which proves plaintiff's contentions with such certainty that all reasonable minds must so find and further that there is no reasonable basis, either in the evidence or from the lack of evidence upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence. Therefore, the Trial Court's findings should not be disturbed and the Trial Court's judgment should be affirmed.

Under the facts, cases and statutes set forth above, defendant respectfully submits that the findings of the Trial Court are supported by substantial evidence in the record, plaintiffs have failed to meet their burden on appeal, and the judgment of the Trial Court should be affirmed.

Respectfully submitted,

HANSON & GARRETT

Attorneys for Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of Sept., 1976, I mailed two (2) copies of the foregoing Brief of Defendant-Respondent to Robert C. Liljenquist, 1700 University Club Building, Salt Lake City, Utah 84111.

R. Vern Holmes
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